THE HON'BLE Mr. JUSTICE B. SUDERSHAN REDDY

and

THE HON'BLE Mr. JUSTICE C.V.RAMULU

W.P.Nos.17793, 17795 to 17797, 4581, 4582 and 4587 of 2005

COMMON ORDER:

In this batch of Writ Petitions, common questions of fact and law arise for consideration; therefore, they are being disposed of by this common Order.

W.P.Nos.17793 and 17795 to 17797 of 2005

In order to examine the question raised in these Writ Petitions, it is sufficient, if the averments in Writ Petition No.17793 of 2005 are noticed. The petitioner is a Private Limited Company registered under the Companies Act engaged in business of manufacture and sale of 'Ready Mix Concrete' having its Registered Office in Mumbai and factory at Nacharam Industrial Area, Hyderabad. It was registered as a dealer on the rolls of the 1st respondent both under the Central Sales Tax Act and the Andhra Pradesh General Sales Tax Act,1957 (for short 'the Act'). The matter arises for consideration in these Writ Petitions is under the Act, rather Value Added Tax (VAT). Under Section 5 read with Schedules specified under the Act, goods are exigible to sales tax at varying rates. However, under Section 5-B of the Act, concessional tariff has been provided for in the case of goods used as raw material, component part, sub-assembly part, intermediary part and packing material in the manufacture or processing of goods inside the State. Thus, the dealer selling goods meant for being used as raw material for manufacture or processing of goods inside the State is made eligible to tax at concessional rate of 4%, provided certification is made in Form G by such buying dealer. Section 5-B of the Act read with Rule 30A of the APGST Rules provides procedure for grant of registration and for issue of the declarations and it is only after due enquiry by the Commercial Tax Officer concerned, registration is granted in Form G-2 on the basis of application made in Form G-1. The petitioner applied for Form G-1 duly furnishing all relevant particulars and after due enquiry, the Commercial Tax Officer granted certificate of registration in Form G2. In the application, it was categorically stated that the material, such as, Cement, Coarse Aggregate, Granite stone, sand, admixtures etc., would be required

for manufacturing Ready Mix Concrete. The petitioner also obtained registration in Form G-2 in respect of the aforesaid materials required to be used in the manufacturing of Ready Mix Concrete. Meanwhile, the Government issued G.O.Ms.No.496, Revenue (CT-II) Department, dated 17-7-2001 making certain goods including cement ineligible for concessional rate of tax under Section 5-B of the Act. The Second Proviso thereto categorically states that purchase of cement by manufacturers of finished goods like asbestos sheets, pipes, paint manufacturers, hallow bricks etc., are eligible for concessional rate of tax under Section 5-B of the Act, if those manufacturers use the cement purchased by them as raw material to produce finished goods for sale. Ready Mix Concrete being an end product, which is distinct by its identity and marketability, there cannot be any controversy that it is covered by Second Proviso to the said G.O.Ms.NO.496, dated 17-7-2001 and as such, the manufacturers of Ready Mix Concrete is entitled to avail the benefit of Section 5-B of the Act. There is no dispute that Ready Mix Concrete is treated as a distinct merchantable commodity by the Legislature by making it exigible to central excise at 8% upto 31-5-1998 and at 0% thereafter and as unclassified goods under Schedule VII of the Act. However, as a matter of abundant caution, the petitioner approached to the then Commissioner of Commercial Taxes for appropriate clarification and the Commissioner by his communication in Lr.No.CCT's Ref.No.AI(1)/1224/2001, dated 9-8-2001 clarified that cement, which is a raw material can be purchased by issue of declaration in Form G. The Commissioner also issued similar clarification to various other industries. Based on this clarification, the Commissioner as well as the assesses (petitioners herein) carried on their affairs. The Commercial Tax Officer issued Form G2 to the petitioner in the year 2004 and it has been issuing Form G for purchase of cement and the details of the same were being furnished along with the annual returns. The Commercial Tax Department, which has full knowledge of the scenario, has been issuing Form G to the petitioner for being used for purchase of cement and that cement was being used in the manufacture of Ready Mix Concrete. While the matter stood thus, the successor Commissioner of Commercial Taxes issued Circular in CCT's Ref.No.AI(4)/1437/2004, dated 8-1-2005 purporting to clarify that the works contractors and traders are not entitled for issue of Form G2 in the context of purchase of cement. Further, it was directed to initiate penal proceedings wherever such purchase of cement was utilized for purposes other than those mentioned in G.O.Ms.No.496, dated 17-7-2001. Subsequently, the Commissioner also issued

another Circular ostensibly in reply to a letter addressed by the Deputy Commissioner, Begumpet Division, declaring that the instructions issued in references 5th and 6th cited in the said letter must be deemed as annulled – instructions issued by the previous Commissioner. While this is so, the Assistant Commissioner, by his communication dated 28-2-2005 deleted 'cement' from the list of items in the G2 certificate of the petitioner, which was, however set aside by the Appellate Deputy Commissioner by his Order dated 18-5-2005 and the matter was remanded for reconsideration and it is pending with the Assistant Commissioner. Further, the Commercial Tax Officer, Nacharam, without even issuing prior notice cancelled the Certificate of G2 Registration granted to the petitioner with effect from 22-1-2005 purportedly based on the Circular dated 8-1-2005, which is under challenge in appeal before the Appellate Deputy Commissioner. Respondent No.1, further initiated penal proceedings for the assessment year 2002-03 and levied penalty of Rs.83,48,730/- under Section 5B(3)(b)(ii) of the Act; aggrieved by which, Writ Petition No.11829 of 2005 was filed and the same was allowed by this Court directing the authority to consider the issue of tenability or otherwise of levy of penalty under Section 5B(3)(b)(ii) of the Act, after providing due opportunity of explaining the petitioner's stand. However, in the meanwhile, the penal proceedings were initiated under Section 5B(3)(b)(ii) of the Act for the assessment years 2002-03 to 2004-05. The petitioner filed the objections resisting the levy, but the Assistant Commissioner even without considering the objections raised proceeded to pass orders levying penalty. The Assistant Commissioner observed that the decision in the case of *Sangam Health Care Products Limited, Secunderabad v. State of Andhra Pradesh* (T.A.No.847/2001) is inapplicable to the facts of the case and impliedly ruled out the applicability of Section 5-B(2)(ii) of the Act; but, however, held that Ready Mix Concrete being not an end product, Form-G cannot be used for purchase of cement for being used in Ready Mix Concrete and that the availment of concessional tariff is against the spirit of law. This Writ Petition is filed seeking a Mandamus declaring that the Circular of Commissioner of Commercial Taxes dated 8-1-2005 and further communication dated 10-2-2005 as illegal, inoperative and *ultra vires* of Section 42A of the Act and also to declare the penalty orders as illegal.

A detailed counter affidavit has been filed by the 1st respondent-Assistant Commissioner (CT) (LTU) denying the allegations made by the petitioner and asserting *inter alia* that the petitioner is a manufacturer of Ready Mix Concrete and

are assesses on the rolls of the Department under the provisions of the Act. The manufacturers in the State are entitled to purchase raw material required for their end product at concessional rate of tax at 4% under Section 5-B of the Act. Under the provisions of Section 5-B of the Act read with Rule 30-A of the APGST Rules the petitioner filed an application in Form G1 for purchase of raw material required for their product - Ready Mix Concrete at concessional rate of tax at 4% and cement is included as one of the raw materials in the said application. Accordingly, the petitioner was given registration as a manufacturer under Section 5-B of the Act and G2 certificate to enable them to purchase cement at concessional rate of 4%. While the matter stood thus, the State Government exercising the powers under Section 5(1-B) of the Act issued G.O.Ms.No.496, dated 17-7-2001. By virtue of this G.O., cement is made ineligible for the purpose of availing concessional rate of tax of 4% under Section 5-B of the Act. Despite the issuance of the above G.O., the petitioner continued to purchase the cement against Form-G, which is in violation of the provisions of Section 5-B of the Act. For the said violation, the petitioner was levied with penalty under Section 5-B(2)(b)(ii) for the year 2002-03 by an Order dated 14-7-2005. Questioning the above penalty order, the present Writ Petition came to be filed. Further, it is stated that under Section 5-B(1)(b) of the Act, the Government may also notify the goods, which are not eligible for concessional rate of tax under this provision and this would mean that the Government, upon review of the situation with regard to implementation of the scheme of concessional rate of tax, can denotify any goods falling under Sections 5-B(1)(a) & (b) of the Act. The State Government found that there was large scale misuse of Form-G in case of purchase of cement by manufacturers; therefore, thought it fit to withdraw the facility of concessional rate of tax on the purchase of cement. As such, the above Government Order had emerged. The power of the Government to denotify the goods for the purpose of availing concessional rate of tax under Section 5-B of the Act had already been upheld by this Court in Writ Petition No.21878 of 1999 and batch, dated 5-11-2004. Further, once G.O.Ms.No.496, dated 17-7-2001 was issued, the petitioner cannot rely upon Form G2 so also on the circular instructions issued by the Commissioner on 9-8-2001, which is not a general circular issued under Section 42A of the Act. The circular instructions dated 8-1-2005 and 10-2-2005, after the above G.O. would only restrict the benefit of concessional rate of tax on cement to the manufacturers. These circulars are only internal communications and not issued under Section 42A of the Act. That apart, the above communication is ‘exhaustive’ as it provides concessional

rate of tax on cement purchased by the manufacturers of cement asbestos sheets, pipes, paint, hollow bricks etc. Petitioner being the manufacturer of Ready Mix Concrete, which is not included in the said G.O., it is not eligible for the concessional rate of tax for the purpose of cement against Form-G. Petitioner, having purchased the cement against Form G, which is not permissible under law, has to incur the consequences of paying the penalty. Therefore, the action of the respondents is justified under the law. The Writ Petition is devoid of merit and liable to be dismissed.

We have given our earnest consideration to the respective submissions made by the learned counsel on either side and perused the entire material made available on record, including the impugned Proceedings.

The only question that falls for consideration in these Writ Petitions is whether by virtue of inclusion of cement in their registration certificate issued under Section 5-B of the Act, the petitioners cannot be denied availing of concessional rate of tax for purchase of cement under G.O.Ms.No.496, dated 17-7-2001; more so, when the earlier Commissioner (CT) on 9-8-2001 had clarified that cement can be purchased as raw material against Form-G ?

For deciding the said question, it is necessary to refer to the provisions under Section 5-B(2) and (3)(b)(i) and (ii) of the Act and Notification issued under G.O.Ms.No.496, dated 17-7-2001, which read as under:

"**5-B. Levy of concessional tax in respect of component parts:**

(2) if any dealer,-

i. not having his manufacturing unit within the State purchases any goods by furnishing a declaration under the proviso to sub-section(1); or

ii. having his manufacturing unit within the State and having purchased goods by furnishing a declaration under the proviso to sub-section(1) sells such goods contrary to such declaration, the assessing authority, may after giving such dealer a reasonable opportunity of being heard, by order in writing, impose upon by him by way of penalty a sum which shall not be less than three times, but which may extent to five times the amount of tax leviable on the sale of such goods so purchased.

3(b) if any dealer, fails to maintain true and complete accounts in accordance with clause (a) and the rules made thereunder, the assessing authority may, after giving such dealer a reasonable opportunity of being heard, by order in writing—

i. disentitle such dealer from making use of any declaration forms prescribed under the proviso to sub-section (1) and require him to surrender forthwith the declaration forms already issued to him, if any, and

ii. impose upon him by way of penalty a sum which shall not be less than three times but which may extend to five times the amount of tax leviable on the turnover of the goods purchased by him on the basis of the declaration forms furnished by him under the proviso to sub-section (1) upto the date of surrender by him of the unused forms."

NOTIFICATION

In exercise of the powers conferred by clause (b) of sub-section (1) of Section 5B of the Andhra Pradesh General Sales Tax Act,1957 (Act No.VI of 1957) and in partial modification of the notification-II in G.O.Ms.No.739 hereby directs that the goods mentioned below are not eligible for concessional rate of tax under Section 5B of the said Act.

1. Petrol
2. H.S.D. (High Speed diesel Oil)
3. Bottled L.P.G.
4. Natural Gas
5. Bedew Leaves
6. Mineral oil
7. Furnace Oil
8. Naphtha
9. Residual petroleum products like LSHS and Aromex
10. Cement

Provided that in the case of manufacturers such as Biscuits and Tiles the purchases of Mineral Oil, Furnace oil, Naphtha and other residual petroleum products like LSHS and Aromex are eligible for concessional rate of tax under Section 5B if those manufacturers use such goods in the industrial boilers owned by them as industrial input.

Provided further that the purchases of cement by manufacturers of finished goods like Asbestos sheets, Pipes, Paint manufacturers using White Cement,

Hallow Bricks are eligible for concessional rate of tax under Section 5B if those manufacturers use cement purchased by them as raw material to produce finished goods for sale."

The above provision (Section 5-B of the Act) is an enabling provision for levy of concessional tax in respect of component parts. Cement is admittedly one of the component parts for manufacturing Readymix Concrete. Further, there is no dispute as to issuance of clarification by the then Commissioner on 9-8-2001, the issuance of G.O.Ms.No.496, dated 17-7-2001 and also cancellation of earlier circular by the present Commissioner through his Proceedings dated 8-1-2005 and 10-2-2005. Admittedly, these circulars were not issued under Section 42A of the Act. There is no dispute between the parties that the Circulars dated 9-8-2001, 8-1-2005 and 10-2-2005 are administrative in character and they are not legally binding, since those Circulars are internal communications and not the circulars issued as required under Section 42A of the Act. This Court in W.P.No.13060 of 2004 and batch, dated 24-8-2005 held that the Circulars, which have no binding force and issued *de hors* of Section 42A of the Act, would not bind the quasi-judicial authorities. Though the authorities under the Act are Officers administratively subordinate to the Commissioner of Commercial Taxes and while, in law, such Circulars would not bind them, there undoubtedly exists a reasonable possibility of their being influenced by such orders/circulars issued by the Commissioner. Since the exercise of this power is, admittedly, not under the provisions of the Act, the impugned Circular therein clarifying/interpreting the order of the Sales Tax Appellate Tribunal was held to be without authority of law and was accordingly set aside. Therefore, both the impugned Circulars, in the instant cases, have to be ignored. Once these circulars are ignored, the impugned orders passed by the authority also need to be ignored for the reason that the authorities under the Act as quasi judicial authorities while considering the case of the petitioners have placed reliance on the Circular issued by the Commissioner (CT) dated 8-1-2005 and the same is also referred to in the impugned Order as one of the references. Since the Circulars issued by the Commissioner (CT) on administrative side are not binding on the assessing authorities, the authorities should not have relied upon those circulars for the purpose of either giving concession earlier or in canceling the said concession thereafter. However, as seen from the impugned Proceedings, the instructions issued by the Commissioner (CT), dated 22-1-2005 and 10-2-2005 have been taken into consideration while issuing those proceedings.

Therefore, the impugned Orders are set aside and the assessing authorities are directed to reconsider the matter afresh by giving notice to the petitioners. Petitioners are at liberty to raise all the grounds available under the law including the application of G.O.Ms.No.496, dated 17-7-2001, which describes and declares the cement as ineligible item and the interpretation of the words in Second Proviso, whether it is exhaustive or illustrative and whether the Readymix Concrete is included therein or not.

W.P.Nos. 4581, 4582 and 4587 of 2005

In this batch of Writ Petitions, the petitioners are sellers. It is their case that if really the manufacturers to whom the petitioners effected sale of cement were ineligible for purchase of the same at concessional rate against declaration in Form G issued, G-2 certificates issued in favour of the manufacturers ought to have been cancelled. But, no such cancellation was made till date. As long as the cement was included in Registration Certificates in Form-G2, the manufacturers are entitled to purchase cement at concessional rate. If any manufacturer purchases cement against declaration in Form-G and uses the same contrary to G-2 Registration Certificate and G.O.Ms.No.496, dated 17-7-1991 or Section 5-B of the Act, the Departmental authorities can proceed against the buyer for taking appropriate penal action. No provision of the Act or Rule authorizes any action against the selling dealer and there is no obligation on him to verify the nature of use by its customers, since selling dealers have no control over the activities of the purchasing dealers. Further, as per the Circular dated 8-1-2005 of the Commissioner (CT), action was directed to be taken against the purchasing dealers and not against the selling dealers. It is their further case that the notification issued under G.O.Ms.No.496, dated 17-7-2001 have no application to their case. The buyers alone are liable for tax or penalty and not the sellers, under the Act. Therefore, the authorities have no jurisdiction to invoke the provisions of Section 5-B(2)(i)&(ii) of the Act insofar as sellers are concerned. In support of their case, the petitioners herein relied upon a decision of this Court in Special Appeal No.30 of 1996, dated 22-1-2003.

The petitioners, who are sellers, though they have filed objections stating that both the provisos of the notification issued under G.O.Ms.No.496, dated 17-7-2001 have no application and the assessing authority has no jurisdiction to assess sellers for the commercial tax is concerned, even if the buyers have played some mischief,

none of those objections were considered by the authority. Therefore, the impugned Orders therein are also liable to be set aside and accordingly, set aside and the matter is remanded to the assessing authority for consideration of the objections raised by these petitioners along with any other legal aspects that may be raised by them.

The authorities are directed to dispose of all the matters, within a period of three months from the date of receipt of a copy of this order after issuing due notice and opportunity of personal hearing, if necessary, to the petitioners, as stated supra.

The Writ Petitions are allowed to the extent indicated above. No order as to costs.

B.SUDERSHAN REDDY,J

6th October, 2005

C.V. RAMULU, J

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